Supreme Court, U.S.
FILED
MAY 7 2002
CLERK

No. 01-1224

In the
Supreme Court of the United States

TRUCKEE-CARSON IRRIGATION DISTRICT,

Petitioners,

vs.

UNITED STATES

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Second Circuit

REPLY BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

In its Response Brief, the United States attempts to present the issues to be decided in this case as narrow and limited. However, the issues presented have far ranging impacts on every federal reclamation project and potentially on every person who derives their water rights from the United States under the western water law doctrine, known as prior appropriation. In 1944, as a result of a negotiated settlement entered into by a number of parties including the United States, the Orr Ditch Decree was entered, ending what was the final adjudication of all of the rights to the use of water from the Truckee River in Nevada. *See Nevada v. United States*, 463 U.S. 110, 143-145 (1983). Since that time, the United States has engaged in a series of efforts (this being the latest) to obtain additional water from the Truckee River for the benefit of the Pyramid Lake Indian Reservation. Certainly, the United States must acknowledge that the present case adversely affects water users within the Newlands Reclamation Project, but beyond that the Court of Appeals decision at issue also establishes the dangerous precedent of undermining the finality of water rights adjudications and rewriting state law with respect to water rights in the western states in order to reallocate that water to the Pyramid Lake Paiute Indian Tribe in contradiction of the prior orders of this Court. The decision also conflicts with orders and rulings of other western states with respect to substantially identical issues, most notably the State of New Mexico.

II. ARGUMENT

A REVIEW OF THIS CASE IS NECESSARY BECAUSE THE COURT OF APPEALS' DECISION IS IN DIRECT CONFLICT WITH AN OPINION OF THIS COURT, IS IN DIRECT CONFLICT WITH

RULINGS BY THE SUPREME COURT FOR THE STATE OF NEVADA, AND, IF LEFT TO STAND, THE ADVERSE IMPACT OF THE DECISION WILL REACH FAR BEYOND THE ACTUAL PARTIES TO THIS CASE

The Court of Appeals held that the United States did not initiate the appropriation of water rights in 1902 under Nevada law when it began the Newlands Reclamation Project.[1] In so doing, the Court of Appeals decision reverses United States Supreme Court precedent regarding the appropriation of water rights within reclamation projects, ignores United States Supreme Court precedent with respect to the finality of the Orr Ditch Decree and the priority date to be given to water rights within the Newlands Reclamation Project, reverses Nevada Supreme Court precedent regarding the initiation and appropriation of water rights and the relation back doctrine,

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[1] In holding that the water rights were not initiated in 1902, the Court of Appeals relied, mistakenly, on the decision in *United States v. Alpine Land & Reservoir Co.*, (9th Cir. 1992) ("*Alpine III*"). The issue in *Alpine III* was whether the water rights had *vested* in 1902. The issue here is whether the water rights had been *initiated* in 1902. Reliance upon the *Alpine* line of cases is misplaced as it concerns the adjudication of water rights stemming from the Carson River, as opposed to the Truckee River waters at issue in this case. Unlike *Alpine*, the roots of this case are found in the Orr Ditch Decree, a negotiated settlement of the water rights entered into by a number of parties including, importantly, the United States. The *Alpine* decisions were both reviewed and criticized by the District Court in its review of this case and, for the reasons articulated in the District Court's opinion, the *Alpine* decisions are not dispositive of the issues presented in this Petition. *See* Appendix to Petition for Writ of Certiorari, B-1.

and, finally undermines the Reclamation Act of 1902.

This Court, on at least three separate occasions addressed the issue of the appropriation of water rights within reclamation projects in the context of discussing the ownership of water rights in irrigation projects built pursuant to the Federal Reclamation Act of 1902. In *Nevada v. United States*, the Court outlined the history of the initiation of water rights within the Newlands Reclamation Project beginning in 1902, and, consistent with that history and the Orr Ditch Decree, held that the priority date for the water rights within the Project is 1902, the date when the project was initiated. *See Nevada v. United States*, 463 U.S. 110, 115-117 (1983). The Court also addressed the fact that within federal reclamation projects, the government is the initial appropriator when it begins the construction of a reclamation project. The Court in *Nevada v. United States* wrote, in part, as follows:

> In two leading cases, *Ickes v. Fox*, 300 U.S. 82 (1937), and *Nebraska v. Wyoming*, 325 U.S. 589 (1945), this Court has discussed the beneficial ownership of water rights in irrigation projects built pursuant to the Reclamation Act. In *Ickes v. Fox*, the Court said: "Although *the government diverted, stored and distributed the water*, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. *Appropriation was made* [by the United States] *not for the use of the government, but, under the Reclamation Act, for the use of the land owners.*"

Nevada v. United States, 463 U.S. 110, 122-123 (1983), *quoting Ickes v. Fox*, 300 U.S. 82, 94-96 (1937) (*emphasis added*); *see also Nebraska v. Wyoming*, 325 U.S. 589, 613-614 (1945) (adopting above quoted language from *Ickes v. Fox*). Three times, this Court recognized that the government is the initial

appropriator of water within federal reclamation projects built pursuant to the Reclamation Act of 1902. The water rights were initiated by the government through the withdrawal of lands and the construction of means to divert, store and distribute the water, and the water rights were perfected by the end water users at various times after that date. *Nevada v. United States, supra.* In the case of the Newlands Reclamation Project, the priority date of those water rights relates back to the date of the first act of appropriation in 1902 regardless of the date the water rights ultimately were perfected. *Id.* In ruling, therefore, that the United States did not initiate the appropriation of the water rights here in dispute in 1902, the Court of Appeals goes against established United States Supreme Court precedent that when the United States began the reclamation projects, it initiated the appropriation of the project water rights. In addition, it should be noted that as a practical matter, there can only be one appropriation of the water.

The Court of Appeals decision also undermines this Court's opinion *Nevada v. United States* upholding the finality of the Orr Ditch Decree and rejecting the United States' attempt to circumvent the rights decreed in the Orr Ditch case. *See Nevada v. United States,* 463 U.S. 110 (1983). Although the United States claims not to dispute the rights decreed in the Orr Ditch case, as this Court found in *Nevada v. United States,* that is exactly what the United States is attempting to do. The Court of Appeals decision facilitates this by holding that the United States did not initiate the appropriation of water rights in 1902 with the passage of the Reclamation Act and the construction of the Newlands Reclamation Project. In so holding, the Court of Appeals permits the application of Nevada's forfeiture law to water rights within the federal reclamation project despite the "savings clause" built into that statute that exempts from application of the forfeiture law those water rights whose appropriation was initiated prior to

1913. The net result is that through the misapplication of the forfeiture law, the United States is able to increase water available for the Pyramid Lake Reservation and increase the limited amount of water compromised by the United States in the Orr Ditch case for the benefit of the Pyramid Lake Indian Reservation in violation of its statutory fiduciary obligations to the farmers within the Project.

As discussed at length in the Petition for Writ of Certiorari, the Court of Appeals decision also is in direct conflict with opinions of the Nevada Supreme Court which hold that a water right is "initiated" when the first steps are taken to appropriate the water. *See Ophir Silver Mining Co. v. Carpenter*, 4 Nev. 534, 543-544 (1869). As long as the appropriator is proceeding with due diligence to apply the water to beneficial use, once the water is actually put to beneficial use, the priority date of the water right will relate back to the date when the first step was taken to appropriate the water. *Id.* By definition, then, under Nevada law and as explained by the Nevada Supreme Court, the priority date and the date the water right was first initiated is always one and the same. *Id.* In the present case, the undisputed priority date for the subject water rights is 1902, a conclusion supported by both Nevada law and the unanimous United States Supreme Court's ruling in *Nevada v. United States.* In further support of this conclusion, the Orr Ditch Decree memorializes the first acts of appropriation initiated by the United States and specifically holds that the United States proceeded with due diligence to construct the canal and irrigation system through which the water eventually was put to beneficial use and holds that the resulting priority date for the water rights is July 2, 1902. Accordingly, when the Court of Appeals held that Nevada's forfeiture statute applies to water rights within the federal reclamation project because it believes that the water rights were not initiated by the government in 1902, and the first act of appropriation occurred when the farmers diverted

water from the district's canals and applied it to a beneficial use, the Court of Appeals' opinion runs afoul of established decisions of the United States Supreme Court, the Supreme Court for the State of Nevada, and the Orr Ditch Decree.

In its Response, the United States attempts to avoid review of this destabilizing precedent by arguing that the issues brought before this Court by Petitioner are not worthy of the Court's consideration because they will only impact a "very narrow range" of water rights. *See* Brief in Opposition, p. 18. First, the mere fact that the Court of Appeals decision is in direct conflict with United States Supreme Court and Nevada Supreme Court precedent regarding the priority dates and the initiation of water rights within federal reclamation projects warrants review by this Court. Beyond that, however, are dangerous implications for all reclamation projects in the western states. If the Court of Appeals decision is permitted to stand, any provision of state law enacted after the initiation of a federal reclamation project or even after 1902 has the potential to defeat an otherwise valid project water right by denying the vested water right owner the full set of rights that apply to the early priority date acquired by the United States and creates a subset of junior priority water rights subject to unwarranted regulation or even termination under the Circuit Courts' analysis.

B THE UNITED STATES HAS TAKEN OPPOSING POSITIONS ON THESE ISSUES IN DIFFERENT CASES TO WHICH IT IS A PARTY, LEAVING THE POTENTIAL FOR CONFLICT BETWEEN COURTS CONFRONTED WITH THE ISSUE OF APPROPRIATION OF WATER RIGHTS WITHIN RECLAMATION PROJECTS

In the present case, the United States took the position, and the Court of Appeals adopted the conclusion, that "the

applicability of the state forfeiture statute was determined not by the United States' 1902 priority date for the Project as a whole, but rather by the date on which each *individual* water user initiated the appropriation of water from the Project and took the first steps to put the water to beneficial use on a particular farm parcel." *See* United States' Brief in Opposition, p. 6-7 (*emphasis added)*. The United States has taken the position in the present case that the issue of appropriation and priority date should be decided on a parcel by parcel, tract by tract basis, and that the individual water users are not entitled, through the doctrine of relation back, to the application of a common priority date of 1902 for purposes of applying the principles of forfeiture or abandonment. The United States, however, argues the exact opposite in another case now pending in state court, namely *State of New Mexico v. Lewis*.[2]

In the United States' Brief filed on January 18, 2002 in the New Mexico case,[3] the United States takes the following

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[2] TCID requests that the Court take judicial notice of the *New Mexico v. Lewis* decision and the United States' Brief filed in connection therewith. For the Court's convenience, the District Court's Supplemental Decision and Order in *New Mexico v. Lewis*, Case Nos. 20294 and 22600, Fifth Judicial District, County of Chaves, State of New Mexico (2001), is reproduced in the Appendix to this Reply to United States' Brief in Opposition, at p. B-1. The *United States' Objections, Comments, and Suggestions to the Court's December 19, 2001, Supplemental Decision and Order and Brief on Certain Matters Requested by the Court* ("United States Brief") filed in that case is reproduced in the Appendix to this Reply to United States' Brief in Opposition at p. A-1.

[3] *New Mexico v. Lewis* deals with the water rights adjudications and not transfers, but this has no effect on the outcome of the analysis.

position with respect to appropriation, priority date, and the doctrine of relation back:[4]

> New Mexico law recognizes that water rights are appropriated for Reclamation projects differently than by individual irrigators and that water is not distributed to the irrigators in accordance with a priority date as would be done if they were the actual appropriators of the water rights.
>
> If the Court ultimately determines that a priority date should be determined for each CID member, then the priority dates for all the members must be the same as the Project based upon relation back. The relation back principle holds that the priority date of a completed project water right will relate back to the date when work on the diversions or other project works began so long as the work has been pursued with due diligence ...
>
> There is no question that the work was carried on with due diligence to bring water to all 25,055 Project acres. Thus, any water rights adjudicated to CID members would have the priority date of the Project based upon relation back.

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[4] Relying on the Ninth Circuit "Alpine" decisions, the plaintiffs in the New Mexico case assert that in establishing priority dates on a reclamation project the state recognized "relation back" doctrine does not apply and the priority date is established on a tract by tract basis. The court concluded in its preliminary ruling that "[I]ssues and controversies remain as to whether Project priority dates should be included in subfile orders of individual members of CID or whether individual priority dates based upon when water was devoted to beneficial use as on a relation back basis must be determined (B-53 and B-56).

United States' Brief, Appendix at p. A-16 to A-18 (*internal citations omitted)*. In the Newlands Project, as in New Mexico, the water rights are apportioned on a pro rata basis with a common projectwide priority date of 1902. The United States in the present case argues that the doctrine of relation back does not apply and that individual water users are not entitled to a 1902 priority date and the benefits that derive therefrom. This position is completely the reverse of the position taken by the United States in the New Mexico case under facts that are similar if not identical. The United States should be judicially estopped (*See Riggett v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 605 (9th Cir. 1996) from asserting this position in the present case given the fact that it has argued in another case that the doctrine of relation back does apply to water rights within a federal reclamation project and that individual water users are entitled to the protection of the early priority date based on the initiation of the first acts of appropriation by the government in constructing the reclamation project.

C. THIS CASE IS RIPE FOR APPEAL BECAUSE THE LEGAL ISSUES AT STAKE ARE FUNDAMENTAL TO THE FINAL DISPOSITION OF THIS ACTION

Contrary to the position taken by the United States in its Response, this case is ripe for appeal. As acknowledged by the United States' in its Response, the Court of Appeals decision specifically defined the legal standard to be applied to forfeiture claims. The remainder of the case rises and falls on the Court of Appeals decision regarding forfeiture and its application to the water rights in question. In sum, the issue of whether the forfeiture law applies to the water rights at issue in this case is fundamental to the remainder of the lawsuit. Where there is an important and clear-cut issue of law that is fundamental to the further conduct of the case, the case

may be reviewed despite its interlocutory status. *See* Robert Stern et al., *Supreme Court Practice* 196 (7th ed. 1998); *see also United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945) ("The cause was remanded for trial in accordance with the ruling of the Circuit Court of Appeals. We think we should review that ruling inasmuch as it is fundamental to the further conduct of the case"); *Michael v. United States*, 454 U.S. 950, 951-952 (1981) ("Where there is an important and clear-cut issue of law which is fundamental to the further conduct of the case and which would otherwise qualify as a basis for certiorari, interlocutory status need not preclude review.")

III. CONCLUSION

Petitioner respectfully requests that this Court grant its Petition for Writ of Certiorari.

Dated: San Francisco, California
May 1, 2002

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STATE OF NEW MEXICO, ex rel. THOMAS C. TURNEY, State Engineer and PECOS VALLEY ARTESIAN CONSERVANCY DISTRICT, Plaintiffs, vs. L.T. LEWIS, et al., UNITED STATES OF AMERICA, Defendants,	)	Nos. 20294 and 22600 CONSOLIDATED Carlsbad Irrigation District Section Membership Phase

UNITED STATES' OBJECTIONS. COMMENTS. AND SUGGESTIONS TO THE COURT'S DECEMBER 19, 2001. SUPPLEMENTAL DECISION AND ORDER AND BRIEF ON CERTAIN MATTERS REQUESTED BY THE COURT

The United States of America ("United States"), by and through its undersigned counsel, hereby provides its objections, comments, and suggestions to the Court's

December 19, 2001. Supplemental Decision and Order ("Supplemental Decision") and memorandum briefs on certain matters as requested by the Court in the Supplemental Decision. For the Court's convenience, the United States provides its comments and/or brief on each of the Court's decisions in the order presented in the Supplemental Decision.

I. THE COURT'S DECISION:

> *Other parties have not specifically responded to the arguments of the United States that in order to have private water rights independently of those afforded through the diversion and storage of Project water members of CID would have to have an independent contract under the Warren Act. Counsel and interested parties are granted leave to respond.*

Supplemental Decision at 13.

A. United States Objections, Comments, Suggestions:

The United States comments that the Court's characterization of the United States' position on the Warren Act is incorrect. The Court's characterization of the United

States' position should be changed as follows: "In order to have **any** private, **non-Project** water rights ~~independently of those afforded through the diversion and storage of Project water~~ **diverted through or stored by Carlsbad Project facilities,** members of CID would have to have an independent contract **with the United States** under the Warren Act." See Act of February 21, 1911, ch. 141,36 Stat. 925; J. B. Bean v. United States, 163 F. Supp. 838, 841 (Ct. Cl. 1958).[1]

Further, the United States would like to comment that the membership phase of these proceedings only involves the adjudication of CID members' rights to water they receive from the Project. It does not involve independent claims for water rights that existed prior to the Project and with priority dates senior to the Project water rights. The requirements of

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[1] The Court does not request further briefing from the United States on the requirements of the Warren Act.

the Warren Act are relevant only if CID members claim Carlsbad Project facilities as a point of diversion or place for storage for those rights.

II THE COURT'S DECISION:

Issues and controversies concerning the appropriate priority dates for storage and diversion of Project water will be determined in the Project (Offer) Phase of these proceedings. NMSA 1978, §72-4-19 provides in pertinent part:

> *Such decree shall in every case declare, as to the water right adjudged to each party, the priority, amount, purpose, periods and place of use, and as to water used for irrigation, except as otherwise provided in this article, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority.*

Under this statute, it is mandatory that a priority date for water rights of individual members of CID be determined. Also, under this statute, "... the specific tracts of land to which it shall be appurtenant, "shall be determined.

Issues and controversies remain as to whether Project priority dates should be

included in snbflle orders of individual members of CID or whether individual priority dates based upon when water was devoted to beneficial use or on a relation back basis must be determine. NMSA 1978, §72-4-19, and Judge Mechem's 1987 Opinion in Aamodt concerning tract by tract determinations have not been discussed by counsel other than counsel for PVACD in connection with the 1987 Opinion. Counsel are granted leave for a period of thirty (30) days after the date of service of this opinion and order to respond to the claims of PVACD that New Mexico law requires an individual tract by tract determination of priorities in these proceeding's which shall include a memorandum brief concerning the proper interpretation of NMSA 1978, §72-4-19.

The Court agrees with the arguments of the United States that NMSA 1978, § 72-10-16 and 73-10-24 concerning the pro rata distribution of water to members of C'ID are controlling; however, this does not answer the question of whether members of CID are entitled to have individual priority dates determined with the specific understanding that Project water vis a vis members of C'ID is to be distributed equitably and on a pro rata basis. (quotes from the parties are omitted; issue of waiver and relinquishment addressed in ¶111 below.]